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July 16, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

Magalie R. Salas, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notice of Written *Ex Parte* Submission by e.spire Communications, Inc.

Re: Notice of *Ex Parte* Presentation by e.spire Communications, Inc.

CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-15/98-78, 98-91

Dear Ms. Salas:

Pursuant to Sections 1.1206(b)(1) and (2) of the Commission's Rules, e.spire Communications, Inc. ("e.spire"), by its attorneys, submits this notice in the above-captioned docketed proceedings of an oral *ex parte* presentation made and written *ex parte* materials distributed on July 15, 1999 during a meeting with Larry Strickling, Chief of the Common Carrier Bureau, Robert Atkinson, Deputy Chief of the Common Carrier Bureau, Carol Matthey, Frank Lamancusa, Jordan Goldstein, and Staci Pies. The presentation was made by Charles H.N. Kallenbach of e.spire and Brad Mutschelknaus and Edward Yorkgitis of Kelley Drye & Warren LLP. Copies of the written materials distributed at the meeting are attached hereto.

During the meeting, e.spire discussed issues related to state commission Frame Relay Interconnection arbitration decisions involving US WEST and e.spire and the FCC's Motion before the United States Court of Appeals for the District of Columbia Circuit to remand its Section 706 First Report and Order in the above-referenced dockets. e.spire presented a handout (appended as Attachment 1) that identified those components of Frame Relay Interconnection that it and US WEST have reached agreement on, as well as those issues requiring arbitration.

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The handout also described several state commission decisions regarding Frame Relay Interconnection (appended as Attachment 2) and requested that the FCC take the opportunity presented by the remand to affirm several positions and conclusions regarding Frame Relay Interconnection.

Pursuant to the Commission's rules, e.spire submits an original and two (2) copies of this written *ex parte* notification and attachments for inclusion in the public record of the above-referenced proceedings. Please direct any questions regarding this matter to the undersigned.

Respectfully submitted,



Brian D. Hughes

Attachments

cc: Larry Strickling (without attachments)
Robert Atkinson (without attachments)
Carol Matthey (without attachments)
Frank Lamancusa (without attachments)
Jordan Goldstein (without attachments)
Staci Pies (without attachments)
International Transcription Service (with attachments)

e.spire COMMUNICATIONS, INC.
Frame Relay Interconnection
***Ex Parte* Presentation**

CC Docket Nos. 98-147, 98-11, 98-26
98-32, 98-15, 98-78, 98-91

Charles H.N. Kallenbach
V.P. Regulatory Affairs
e.spire Communications, Inc.

Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Kelley Drye & Warren, LLP

July 15, 1999

e.spire Communications, Inc.

- Provides facilities-based packet-switched frame relay service in Mid-Atlantic, South and Southwest.
 - IntraLATA exchange service.
 - InterLATA exchange access service to other frame relay carriers as well as itself.
 - InterLATA “toll” service.
- Sought Section 251(c)(2) interconnection of its frame relay networks with those of U S WEST and other ILECs.
- Reached agreement with all carriers except U S WES, which simply wanted e.spire to purchase tariffed frame relay service.
- Filed arbitrations in AZ, CO, NM in July 1998 to obtain Section 251(c)(2) interconnection with U S WEST at Section 252(d)(1) pricing.

Components of Frame Relay Interconnection Agreed to by U S WEST and e.spire

- Interconnection trunks between the networks (equivalent to trunks used for the interconnection of circuit-switched networks).
- Network-to-Network Interface (NNI) port at each carrier's frame relay switch.
- Data Link Connection Identifier (DLCI) at each NNI port.

Arbitration Issues

- Are frame relay networks among the networks that ILECs must interconnect with under Section 251(c)(2)?
- What are the components of frame relay interconnection?
- What is the proper pricing for interconnection when used for
 - IntraLATA local?
 - InterLATA exchange access (including interstate)?
- What is the proper reciprocal compensation arrangement for the exchange of local frame relay traffic?

Relevant FCC Decisions

- *Local Competition Order*, August 1996.
 - State commissions have jurisdiction to decide both intrastate and interstate aspects of interconnection (§§ 84, 92).
 - Carriers that provide exchange access to themselves in addition to others entitled to Section 251(c)(2) interconnection for that purpose (§ 191).
- *Section 706 Decision*, August 1998.
 - Pro-competitive provisions of the Act apply equally to advanced service and circuit-switched voice services (§ 11).
 - Carriers entitled to interconnect their packet-switched networks with the packet-switched networks of ILECs pursuant to Section 251(c)(2) (§§ 38-49).
 - Advanced packet-switched services are either local exchange or exchange access services (§ 40).

Arbitration Results in U S WEST States

- AZ (Jan. - May 1999) - *consistent with FCC orders*.
 - Bill and keep for IntraLATA traffic.
 - TELRIC pricing for interconnection facilities when used for InterLATA (including interstate) exchange access.
- CO (Oct. 98 - July 99) - *at odds with FCC orders*.
 - Carrier that initiates establishment of intraLATA frame relay circuit pays for transport and termination at TELRIC prices.
 - e.spire pays for NNI out of retail tariff for interconnection that supports interLATA and interstate exchange access (despite fact that CO PUC found U S WEST's tariff fails Section 252(d)(1) pricing standard).

Arbitration Results in U S WEST States (cont'd.)

- CO (Oct. 98 - July 99), (cont'd).
 - In May, CO PUC concluded e.spire not entitled to Section 252(d)(1) pricing because e.spire to provide exchange access to self as well as others (directly contrary to FCC's *Local Competition Order*).
 - On July 8, CO PUC denied reconsideration because e.spire allegedly sought Section 252(d)(1) pricing for transport and termination of interLATA/interstate traffic (the PUC ignoring the fact that the issue was pricing of interconnection facilities, not applicability of Section 251(b)(5) to interLATA traffic).

Arbitration Results in U S WEST States (cont'd.)

- NM (Dec. 98 (on reconsideration)) - *at odds with FCC orders.*
 - PRC ordered e.spire to pay for interconnection facilities used to support interstate exchange access out of federal tariffs.
 - PUC claimed it had no jurisdiction over interstate aspects of interconnection.

Requested FCC Action

- Take opportunity on voluntary remand of the *Section 706 Decision* to:
 - Affirm that state commissions have jurisdiction over interstate and intrastate aspects of interconnection of packet-switched networks.
 - Clarify that whether frame relay service is telephone exchange service or exchange access depends on circumstances.
 - Where, as is common, single zone pricing throughout a LATA, intraLATA frame relay service should be treated as telephone exchange service.
 - Outside of LATA, access to intraLATA network of providers should be considered exchange access service.
 - Where interLATA PVCs traverse interconnection facilities of two intraLATA carriers, the two carriers are jointly providing exchange access.

Requested FCC Action (cont'd.)

- Confirm that a carrier using interconnection with an ILEC to provide frame relay equivalent of exchange access to others, as well as itself, is entitled to Sections 251(c)(2) interconnection and 252(d)(1) pricing.
- Affirm that where a state Commission finds a set of rates for interconnection do not meet Section 252(d)(1) pricing, it may not order those rates to apply to Section 251(c)(2) interconnection.
- File *amici curia* briefs in support of these positions in e.spire Section 252(e)(6) appeals.

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission
DOCKETED

JIM IRVIN

COMMISSIONER-CHAIRMAN

TONY WEST

COMMISSIONER

CARL J. KUNASEK

COMMISSIONER

FILE
ORIGINAL

FEB 19 1999

DOCKETED BY



IN THE MATTER OF THE PETITION BY
E-SPIRE™ COMMUNICATIONS INC.,
AMERICAN COMMUNICATIONS SERVICES OF
PIMA COUNTY, INC. AND ACSI LOCAL
SWITCHED SERVICES, INC. FOR
ARBITRATION WITH U S WEST
COMMUNICATIONS, INC. OF
INTERCONNECTION RATES, TERMS AND
CONDITIONS PURSUANT TO 47 U.S.C.
SECTION 252(b) OF THE
TELECOMMUNICATIONS ACT OF 1996.

DOCKET NO. T-01051B-98-0406
T-03596A-98-0406
T-03597A-98-0406
T-03598A-98-0406

DECISION NO. 61527

OPINION AND ORDER

DATE OF HEARING: November 5, 1998

PLACE OF HEARING: Phoenix, Arizona

PRESIDING ARBITRATORS: Jerry L. Rudibaugh, Lyn Farmer, and Barbara M. Behun

APPEARANCES: BROWN & BAIN, P.A., by Mr. Michael W. Patten and
KELLEY DRYE & WARREN, L.L.P., by Mr. Edward A.
Yorkgitis, Jr., on behalf of e-spire™ Communications, Inc. (fka
American Communications Services, Inc.); American
Communication Services of Pima County, Inc.; and ACSI Local
Switched Services, Inc. dba e-spire™, and

FENNEMORE CRAIG, P.C., by Mr. Timothy Berg, and U S
WEST Communications, Inc., by Mr. Thomas M. Dethlefs, on
behalf of U S WEST Communications, Inc.

BY THE COMMISSION:

This is an arbitration proceeding under § 252 of the Communications Act of 1934, as
amended by the Telecommunications Act of 1996, and A.A.C. R14-2-1501 through R14-2-1509, the
Commission's Arbitration and Mediation Rules.

On July 21, 1998, e-spire™ Communications, Inc. (fka American Communications Services,
Inc.); American Communication Services of Pima County, Inc. ("ACSPC"); and ACSI Local
Switched Services, Inc. dba e-spire™ ("ACSI-LSS") (collectively "e-spire™") filed with the Arizona
Corporation Commission ("Commission") a petition for arbitration of an amended interconnection

1 agreement with U S WEST Communications, Inc. ("U S WEST") ("Petition") pursuant to Section
2 252(b) of the Telecommunications Act of 1996 ("1996 Act"). By Procedural Order dated July 22,
3 1998, the matter was set for an arbitration hearing on October 1, 1998. On August 7, 1998, U S
4 WEST filed its Response to the Petition.

5 On August 17, 1998, e-spire™ filed a motion for summary decision and modified arbitration
6 schedule ("Motion"). U S WEST filed a response on August 24, 1998; and e-spire™ filed a reply on
7 August 31, 1998. On September 9, 1998, oral argument was presented on the Motion, and a ruling
8 was issued. On September 17, 1998, e-spire™ submitted a proposed arbitration schedule stipulated
9 to by the parties. On September 22, 1998, the arbitration hearing was rescheduled to November 5,
10 1998. The parties submitted a joint pre-arbitration statement and pre-filed testimony. The arbitration
11 panel heard the matter on November 5, 1998, at which the parties testified and presented evidence.
12 The parties submitted post-hearing briefs on December 15, 1998.

13 DISCUSSION

14 Pursuant to the 1996 Act, based upon the date e-spire™ requested negotiation for
15 interconnection, the Commission's Decision would have been due on November 4, 1998. As the
16 parties desired additional time to complete discovery and argue pre-hearing motions, they stipulated
17 that a Decision issued at the last Open Meeting of January 1999 would be timely.

18 e-spire™'s operating subsidiary, ACSPC, was granted a Certificate of Convenience and
19 Necessity ("Certificate") to provide competitive telecommunications services in Arizona, in Decision
20 No. 60078 (February 19, 1997). The local switched services portion of the Certificate was
21 transferred from ACSPC to ACSI-LSS in Decision No. 60711 (February 27, 1998). e-spire™
22 currently operates a local fiber optic network in Tucson, Arizona. e-spire™ also provides
23 competitive local exchange services in Arizona through the resale of U S WEST's wholesale
24 products.

25 This arbitration concerns frame relay services ("FRS"). FRS is an advanced digital
26 communications service provided using high-speed, packet-switching technology. FRS may support
27 digital voice service, but it typically is used to connect end users served by the same or multiple
28

1 frame relay switches ("FR switches") for the exchange of digital data.¹ A customer accesses the
2 frame relay network ("FRN") through a user-to-network interface ("UNI") and a frame relay access
3 link ("FRAL") to the nearest FR switch. For one location to communicate with another, each
4 location is given a data link connection identifier ("DLCI"), which is placed in the header of each
5 frame and identifies the address to which each frame is to be sent. Each set of DLCIs creates a
6 permanent virtual circuit ("PVC"), which allows for one-way communication between the two
7 locations. Most FRS is between affiliate or parent and subsidiary companies, and is bi-directional.
8 For two-way communications, two PVCs consisting of two pairs of DLCIs must be provisioned. The
9 assignment of a DLCI is one-time software programming in the switches, which takes approximately
10 five to seven minutes, according to testimony. Additional PVCs may be designated as desired, to
11 enable a customer to communicate with alternative destinations, as chosen by the customer prior to
12 transmittal of the communication. There is an incremental charge for each PVC designation.

13 The FRN is commonly referred to as a "cloud". Communications do not transfer through any
14 pre-designated pathway. The frames, or packets of information, transfer through available FR
15 switches via high-speed trunks, to the FRAL of the recipient. Typically, data transfers back and forth
16 between two endpoints designated by PVCs on both ends of the communication. As not every FRS
17 customer transmits simultaneously, capacity on the network may be used by those that are
18 transmitting, allowing for faster transmission of information. According to testimony, PVCs can
19 oversubscribe the capacity of the FRALs and trunks 2:1, as the FRN is shared, and all endpoints are
20 not used at the same time.

21 Two FRNs may be connected through a network-to-network interface ("NNI"), which is a
22 frame relay port connected via a high speed access link to a corresponding NNI port on the FR switch
23 of another FRN. NNIs, like UNIs, may have multiple PVCs flowing through the same NNI port and
24 access link.

25
26 ¹ Instead of maintaining a channel of communications for the duration of the information transfer, packet
27 switching breaks the information into packets that are transmitted separately over the most efficient route available.
28 Information is reassembled at its destination. Bulk information transfers, such as inventory and ordering, between parent
corporations and branches or subsidiaries, such as banks, restaurants and supermarkets, may be conducted through
packet-switched technology.

1 The FRNs of U S WEST and e-spire™ are essentially equivalent in function and facilities.
 2 There is no technical barrier to interconnecting the two networks. Interconnection would require a
 3 NNI port at each carrier's FR switch, with high speed transport between the NNIs. DLCIs at the
 4 switches would specify locations connected by PVCs.

5 FRS customers purchase a FRAL. By tariff, customers also are charged for use of a UNI or
 6 NNI switch port, switch overhead, and use of the trunks that make up U S WEST's network. For
 7 FRS, a customer must purchase either two user-to-network information transfer ("UNIT") elements,
 8 which prices UNI ports with PVCs, or a UNIT and a network-to network information transfer
 9 ("NNIT"), which prices NNI ports with PVCs. The UNIT and NNIT include transport on U S
 10 WEST's network. Charges are not based upon the time or distance of the FRS, other than the length
 11 of the FRAL from the customer location to the FR switch.

12 1. Is FRS interconnection subject to § 251(c)(2) of the 1996 Act?

13 e-spire™ position

14 e-spire™ has stated its intention to provide FRS through the resale of U S WEST's FRS, and
 15 to combine elements of its own facilities and unbundled network elements obtained from U S WEST.
 16 e-spire™ has requested that the Commission determine the method of interconnection of its network
 17 with U S WEST's network for the provision of FRS. e-spire™ asserted that the 1996 Act's
 18 requirement that an incumbent local exchange carrier ("ILEC") interconnect its facilities with those
 19 of a competitive local exchange carrier ("CLEC") "for the transmission and routing of telephone
 20 exchange service and exchange access", 47 U.S.C. § 251(c)(2), includes the obligation to
 21 interconnect for the provision of FRS. e-spire™ stated that it would be transmitting and routing
 22 telephone exchange services and exchange access services on its FRN, and on U S WEST's FRN.
 23 e-spire™ proposed a compensation plan for interconnection.

24 e-spire™ requested that it be treated as a co-carrier, rejecting U S WEST's offer to provide
 25 FRS pursuant to its tariff. e-spire™ anticipates using the interconnection for exchange access
 26 services for itself and other carriers with non-local FR traffic that originates or terminates either on
 27 e-spire™'s FRN or on another carrier's FRN with which e-spire™ is interconnected on a local basis.
 28

1 Interconnection will also allow U S WEST to transmit FR information between its customers and
2 those on e-spire™'s network.

3 e-spire™ sought interconnection of its FRN with U S WEST's FRN under cost-based rates,
4 plus a reasonable profit, pursuant to § 252(d)(1)(A) of the 1996 Act. e-spire™ proposed to apply the
5 voice network interconnection rate structure to FRS. e-spire™ claimed that U S WEST's obligation
6 applies whether the traffic over the interconnection facilities – which are within a single LATA – is
7 intraLATA or interLATA. e-spire™ also alleged that intraLATA frame relay traffic exchanged over
8 the interconnection is subject to the reciprocal compensation provisions of §§ 251(b)(5) and
9 252(d)(2) of the Act.

10 e-spire™ submitted that the ruling of the Federal Communications Commission ("FCC") in
11 FCC-98-188, released on August 7, 1998 ("Section 251(c) Order") supported its claim that U S
12 WEST is obligated to interconnect pursuant to § 251(c). The Section 251(c) Order denied the
13 petitions of U S WEST and several other ILECs for relief from § 251(c) obligations applicable to
14 packet-switched services. e-spire™ indicated that U S WEST's unsuccessful arguments in the
15 Section 251(c) Order were virtually identical to those herein.

16 U S WEST position

17 U S WEST contended that § 251(c) does not govern interconnection of its FRN, alleging that
18 FRS is not used "for the transmission and routing of telephone exchange service and exchange
19 access." U S WEST also alleged that it does not provide FRS in the capacity of an ILEC. U S
20 WEST claimed that FRS are not part of the public switched telephone network, but are dedicated
21 facilities that do not depend upon access to the public switched telephone network. U S WEST
22 indicated that it does not agree with the FCC's Section 251(c) Order regarding the obligation to
23 interconnect.

24 Commission resolution

25 The Section 251(c) Order concluded that advanced services, specifically including packet-
26 switched networks of ILECs, are telecommunications services, subject to the interconnection
27 obligations of § 251(c)(2). The FRN of U S WEST is a publicly offered network of advanced
28

telecommunications services. Interconnection of the FRNs of e-spire™ and U S WEST should be accomplished in accordance with § 251(c)(2) of the 1996 Act, A.A.C. R14-2-1101, *et seq.*, and A.A.C. R14-2-1301, *et seq.* Likewise, pricing of the interconnection should be according to § 251(c) and § 252(d) of the 1996 Act. e-spire™, as a co-carrier, is not limited to purchase retail FRN services from U S WEST's tariff.

2. Interconnection and cost issues.

e-spire™ proposed that interconnecting parties each absorb the cost of providing a port on the interconnection switch, and share the cost of establishing the interconnection trunks. e-spire™'s proposed cost sharing for interconnection for intraLATA PVCs and TELRIC-based rates for interLATA traffic is as follows:

1. Interconnection Ports and Transmission Facilities

The parties should share the costs of local (intraLATA) interconnection equally. For the transmission facilities, *i.e.*, interconnection trunks, to the extent they are used to exchange intraLATA traffic, the costs should be shared equally based on U S WEST's TELRIC-based rates for transport. Each party should absorb the cost of its own NNI ports, to the extent the ports are used for intraLATA traffic.

For interLATA traffic, *i.e.*, where e-spire™ uses the interconnection to transmit and route frame relay exchange access traffic for other carriers and/or itself, e-spire™ should pay for both an NNI port at the U S WEST switch and for a transmission circuit between the parties' switches, but only up to the percentage of interLATA use of the port and transmission facilities. These payments should be TELRIC-based.

Both intraLATA and interLATA PVCs can be carried over the same interconnection trunks and NNI ports. Jurisdictional (intra- vs. inter-LATA) allocation of port and transmission facility costs should be determined by the percentage of total PVCs over a facility that are intraLATA, *i.e.*, where both end user locations are in the same LATA.

2. DLCIs

For intraLATA PVCs, each party should bear its own costs to establish DLCIs. For interLATA PVCs, e-spire™ should pay U S WEST for DLCIs on U S WEST's end of the interconnection, at TELRIC-based rates. (DLCI charges should be non-recurring charges only.)

3. Reciprocal Compensation for IntraLATA Traffic

For transport and termination of local frame relay traffic carried over intraLATA PVCs, bill and keep arrangements should be utilized.

4. Compensation for the End User Segment of PVCs

For both intraLATA and interLATA PVCs, U S WEST's end user should be charged for the U S WEST end user's frame relay access link ("FRAL") plus the U S WEST UNI port and access to U S WEST's network (*i.e.*, the User-to-User Network Information Transfer, or "UNIT").

1 Brief, pages 11 and 12.

2 2(a). May local and toll traffic be commingled on the same trunk?

3 e-spire™ position

4 e-spire™ claimed that commingling traffic is the most efficient and cost-effective way to
5 provide FRS. e-spire™ indicated that there is no local or toll component for accessing U S WEST's
6 FRN. e-spire™ stated that distance is not measured for FRS and there is no reasonable way to
7 measure the distance of the communication. e-spire™ proposed that traffic be considered intraLATA
8 or interLATA based upon the locations in the DLCIs. According to e-spire™, since PVCs are fixed
9 and traffic is not measured, using the percentage of PVCs over a facility that are intraLATA rather
10 than interLATA is a reasonable and cost-effective method for determining intraLATA usage.

11 e-spire™ further proposed that the local calling area for FRS be the intraLATA region.
12 e-spire™ indicated that U S WEST does not presently differentiate between the local area for the
13 voice network and its intraLATA region for FRS.

14 U S WEST position

15 U S WEST proposed that separate trunking of local and toll traffic is required. U S WEST
16 claimed that usage of the PVCs allows gaming of the system, as it assumes that traffic over the FRN
17 begins and ends at the PVCs. U S WEST claimed that PVCs could be linked together to make the
18 communication over the NNI appear to be local. U S WEST also indicated that e-spire™'s current
19 interconnection agreement requires separate local and toll trunking for its voice network
20 interconnection.

21 Commission resolution

22 Commingling is an efficient and cost-effective method of providing FRS. e-spire™'s
23 agreement to separate local and toll trunking with its voice network does not prevent it from
24 commingling traffic for the provision of FRS. e-spire™ may commingle intraLATA and interLATA
25 communication on the same interconnection trunk, to be grouped and compensated for based on the
26 ratio of intraLATA to interLATA PVCs determined by using PVC endpoints.

27 e-spire™'s proposal includes safeguards and planning sessions that should be sufficient to
28

1 prevent gaming of the system. If U S WEST has reason to suspect that gaming has occurred, it
2 should submit the issue to the Commission for further consideration.

3 2(b). What is the appropriate compensation for interconnected FRS?

4 e-spire™ position

5 e-spire™'s position is as stated above. Generally, it proposed a bill and keep arrangement for
6 intraLATA FRS, and proposed to compensate U S WEST for interLATA traffic through its switch.
7 e-spire™ proposed that for interLATA traffic, U S WEST's customer should compensate U S WEST
8 for its intra-network transport and UNIT switch port.

9 As an alternative to each party absorbing the cost of its own NNI port, e-spire™ proposed that
10 it will compensate U S WEST for the NNI port at U S WEST's switch until the seventh PVC of any
11 type is loaded onto the NNI port. e-spire™'s proposal was in response to U S WEST's concern that it
12 would be locating NNI ports where dictated by competitive local exchange carriers ("CLEC"), and it
13 would not recover its costs without sufficient customers. According to U S WEST's 1996 FRS cost
14 study, once seven PVCs are loaded on the standard NNI port, U S WEST recovers from UNIT
15 charges alone its costs for the NNIT, UNIT and interconnection transport. e-spire™ acknowledged
16 that U S WEST claimed that its cost study was out-of-date, but stated that the study was the best
17 evidence available of U S WEST costs for those unbundled network elements ("UNE").

18 U S WEST position

19 U S WEST contended that FR interconnection is available through its tariff, by ordering its
20 UNIT, FRAL, and PVC, as well as e-spire™ providing use of its own PVC, FRAL, and UNIT or
21 NNIT, or equivalents, on e-spire™'s network. For example, e-spire™'s customer would have to pay
22 1 ½ PVCs and two UNITS, rather than one PVC and one UNIT under e-spire™'s proposal. A
23 network seeking to connect to U S WEST's FRN would be required to pay 100 percent of the
24 transport medium connecting the two NNI ports, its own as well as U S WEST's NNI port, U S
25 WEST's inter-switch trunking and the PVC for U S WEST's customer, and its own PVC.

26 U S WEST claimed that e-spire™'s request would modify U S WEST's retail rate structure,
27 violating Scates, and exceeding Commission jurisdiction under the 1996 Act. U S WEST also
28

1 alleged that bill and keep and reciprocal compensation should not apply to FRNs.

2 Commission resolution

3 This arbitration, as with previous arbitrations, does not alter the retail tariff structure of U S
4 WEST, and does not violate Scates. The pricing determined herein is for UNEs, interconnection, and
5 wholesale services offered for resale. Pursuant to § 252(d) of the 1996 Act, the Commission has the
6 authority to set rates and conditions for UNEs, and to define and set rates for new UNEs. There is no
7 requirement that the rate structure for UNEs mirrors the tariffed retail pricing structure. The tariffs,
8 even for items such as the NNI, are tariffed services. The tariffed pricing was formulated prior to the
9 1996 Act, including § 252(d) pricing standards. The tariffed prices do not meet the pricing or
10 compensation standards of the 1996 Act. The tariffs were designed for users who are not
11 telecommunications carriers under the 1996 Act. U S WEST's cost study, although represented to be
12 out-of-date, better reflects the intent of the 1996 Act's pricing standards than the tariffs. Therefore,
13 where not superseded by Decision No. 60635, the cost study will be used.

14 The Commission will not apportion costs of FRS solely based upon who is the requesting
15 party. Even though a request from an e-spire™ customer may trigger the ordering of the connection
16 and expenditure of funds by both parties, it is not the cost-causer in the traditional sense. Most FRS
17 is bi-directional, and the locations must be installed in software prior to transmission. For situations
18 in which PVCs are not mutual, and transmission is to be solely from an e-spire™ location to a U S
19 WEST customer, or from a U S WEST location to an e-spire™ customer, the initiator of the
20 transmission shall be required to pay for the set-up of the DLCIs, on a non-recurring basis. For
21 typical FRS, in which the U S WEST customer also creates a PVC to transmit to the e-spire™
22 customer, U S WEST's customer and U S WEST clearly benefit by the interconnection. e-spire™'s
23 fiber optic network provides access to its FR switch throughout Tucson, and it has deployed a FR
24 switch in the Phoenix LATA. e-spire™'s network serves a large portion of geographic area served
25 by U S WEST's FRN, especially as access to U S WEST FR switches is limited by its end office
26 structure. Endpoints in the LATA, but off-network, could be reached by e-spire™ through the use of
27 loops and back haul transport facilities, just as with U S WEST. Therefore, a bill and keep method of
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1 cost-sharing establishment of DLCIs and intra-network transport is appropriate.

2 U S WEST stated that its FRS cost study is out of date. The evidence does not support the
3 use of tariffed prices as surrogates. Accordingly, the U S WEST cost study will be used as element
4 prices, where prices have not been superseded by Decision No. 60635 (January 30, 1998).²

5 In order to reduce the risk to U S WEST when required to interconnect pursuant to its
6 obligation under the 1996 Act, and in accordance with the offer made by e-spire™, e-spire™ shall
7 pay for all of the interconnect trunk and NNI port at TELRIC-based rates until seven PVCs are
8 loaded on the NNI port. As soon as seven PVCs are on the NNI port, bill and keep will apply to all
9 intraLATA PVCs on the trunk. Transport and port charges will be based upon the UNE rates adopted
10 in Decision No. 60635. This surrogate cost may be revised upon submittal by U S WEST of a
11 revised cost study, with analysis by e-spire™ and review by the Commission.

12 U S WEST is not currently authorized to provide interLATA telecommunications services.
13 Until U S WEST obtains such authority, a different compensation plan is appropriate for interLATA
14 traffic as opposed to intraLATA communications.

15 U S WEST presently provides access to interLATA FRS to its customers. Although unclear
16 from the record, it appears that U S WEST charges its interLATA FRS end-user for the portion of the
17 access link between the end user location and the UNI port, inclusive. If so, then e-spire™ should
18 pay for the remainder of the interLATA interconnection, including its own costs, and the costs for U
19 S WEST's NNI port and interconnection transport between the carriers' switches, at TELRIC-based
20 rates. These costs may include the cost for setting up DLCIs, if U S WEST is not already
21 compensated from its end user.

22 If U S WEST does not receive compensation from its interLATA FRS end user for the FRAL
23 and UNIT, then e-spire™ should compensate U S WEST for those elements, either by purchasing
24 FRS at wholesale discounted rates, or by purchasing UNEs.

25 Transport and port charges shall be based upon rates established in Decision No. 60635, with
26 the remainder of the charges from U S WEST's FRS cost study. A surrogate charge for
27

28 ² Within four months of the effective date of this Order, U S WEST shall submit a new cost study for
analysis by e-spire™ and review of the Commission.

1 establishment of DLCIs of \$10, as presented at the hearing, will be used.

2 3. What is U S WEST's resale obligation for FRS?

3 e-spire™ position

4 For resale, e-spire™ requested that it be able to purchase the FRAL and UNIT at the Section
5 251(c)(4) discount and any other applicable charge assessed end users to transport frame relay traffic
6 between the carriers. e-spire™ claimed rights to the discount even though it alleged that it was not
7 responsible for U S WEST's NNIT charge. e-spire™ alleged that the service being purchased is the
8 routing of information from U S WEST's customer's location to the point of hand off with an
9 interconnection carrier. e-spire™'s proposed compensation plan would eliminate its responsibility to
10 pay for U S WEST's NNIT. § 251(c)(4) requires an ILEC "to offer for resale at wholesale rates any
11 telecommunications service that the carrier provides at retail to subscribers who are not
12 telecommunications carriers." e-spire™ submitted that U S WEST's tariff contains no restrictions on
13 a customer purchasing single components of FRS, such as a FRAL. e-spire™ claimed that in effect,
14 the FRAL, UNIT and NNIT are retail telecommunications services, eligible for the resale discount.
15 e-spire™ claimed that U S WEST has presented a new issue regarding the items that comprise a
16 finished FRS and are eligible for a wholesale discount.

17 U S WEST position

18 U S WEST claimed that e-spire™ is not entitled to its interconnection proposal and a resale
19 discount. U S WEST also claimed that to receive the discount, the entire service as offered to
20 subscribers, including NNIT and PVC charges, must be resold by e-spire™.

21 U S WEST did not waive the issue by not broadening the scope of e-spire™'s Petition or in
22 response to e-spire™'s Motion. The issue was included in the parties' joint pre-arbitration statement
23 filed on October 21, 1998, and was included in evidence presented at the hearing, as well as the post-
24 hearing briefs. It clearly is an unresolved issue over which the Commission has jurisdiction pursuant
25 to the 1996 Act and our Rules.

26 Commission resolution

27 For wholesale services offered for resale, e-spire™ must purchase the items that make up the
28

1 service. § 251(c)(4). The evidence indicated that off-network end users typically do not have to
 2 purchase the PVC of the U S WEST end user. Accordingly, for resale purposes, e-spire™ must
 3 purchase, at a minimum, the UNIT and NNIT. The UNIT and NNIT already include PVC costs.
 4 e-spire™ is not obligated to pay a PVC cost to U S WEST beyond that included within the UNIT and
 5 NNIT.

6 3(a). What is the applicable wholesale discount for FRN?

7 e-spire™ position

8 e-spire™ and U S WEST amended their interconnection agreement in August 1997
 9 ("Amendment"), adopting terms for resale of U S WEST's retail services contained in the
 10 interconnection agreement between U S WEST, GST Tucson Lightwave, Inc. and GST Net (AZ),
 11 Inc. ("GST"). The wholesale discount stated in the appendix to the Amendment is 17 percent for all
 12 services. e-spire™ contended that the applicable discount should be 18 percent, as approved for
 13 resold services in Decision No. 60635, rather than 17 percent. e-spire™ claimed that the discounted
 14 rates were interim, quoting a footnote in the Amendment, which states that "services and discount
 15 rates are pursuant to the Commission Order in Docket No. U-3155-96-527." The Decision in that
 16 Docket, Decision No. 60043 (February 5, 1997), page 8, stated that "we will adopt an interim
 17 discount of 17 percent, to apply to all resale services until the Commission completes its evaluation
 18 of the cost studies." GST's interconnection agreement contained a provision for interim rates and a
 19 true-up for items in Appendix A, which included the resale rates.

20 U S WEST position

21 U S WEST claimed that e-spire™ is entitled to the 17 percent stated in the Amendment. U S
 22 WEST contended that e-spire™ did not opt into the true-up provision of the GST interconnection
 23 agreement pertaining to resale.

24 Commission resolution

25 At the conclusion of oral argument on September 9, 1998, the Commission determined that if
 26 the resale rates in the Amendment were interim and to be replaced by Decision No. 60635, the
 27 wholesale discount rate would be 18 percent. If the terms of the contract were to survive the outcome
 28

1 of the consolidated cost docket, the discount rate would be 17 percent. The parties were directed to
2 try to resolve the discount issue. To date, the parties have not indicated any resolution of the issue.
3 We therefore will determine the issue herein.

4 e-spire™, under the name "ACSI", had itself submitted to an earlier arbitration, in Docket No.
5 U-3021-96-448. At the conclusion of the arbitration proceeding, the parties entered into an
6 interconnection agreement, which was filed by the parties on April 21, 1997. The interconnection
7 agreement provided as follows, at page 58:

8 VII. RESALE SERVICES

9 U S WEST hereby agrees that ACSI may at any time during the term of this
10 Agreement elect to resell U S WEST's local exchange services under the terms
11 and conditions of any local services resale agreement reached between U S
12 WEST and any other telecommunications carrier. ACSI may select any such
13 resale agreement at any time prior to the expiration of this Agreement.

14 The interconnection agreement contained a true-up provision at page 66, which was limited to
15 unbundled network element ("UNE") rates. The Amendment, which incorporated the election of
16 GST resale rates, did not contain any provision for interim rates or a true-up, although it did footnote
17 the Decision in the GST arbitration.

18 It is possible that by footnoting Decision No. 60043, the parties intended to incorporate the
19 interim provision in its resale rates. It is also possible that the parties anticipated that allowing ACSI
20 to add a resale provision during the life of the contract should provide for discounts that would be
21 permanent for the duration of the contract. In support of the latter conclusion, the underlying
22 interconnection agreement expires on February 27, 1999, unless renewed by the parties.
23 Furthermore, the Commission's jurisdiction is limited to issues specifically contested by the parties,
24 and the parties can agree to terms different than those that the Commission recommends. There is no
25 reason to believe that the original ACSI contract anticipated interim resale rates. The parties could
26 have made such an intention clear in the amendment, which is ten pages in length, plus attachments.
27 Based upon the foregoing, we determine that the resale discount is fixed at 17 percent for the duration
28 of the interconnection agreement.

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. U S WEST is certificated to provide local exchange and intraLATA telecommunications services to the public in Arizona.

2. e-spire™ is certificated to provide local exchange and statewide telecommunications services to the public in the State of Arizona.

3. On July 21, 1998, e-spire™ filed with the Commission a Petition pursuant to the 1996 Act.

4. By Procedural Order dated July 22, 1998, an arbitration hearing was scheduled for October 1, 1998.

5. On August 7, 1998, U S WEST filed a Response to the Petition.

6. On August 17, 1998, e-spire™ filed a motion for summary decision and modified arbitration schedule.

7. On August 24, 1998, U S WEST filed a response.

8. On August 31, 1998, e-spire™ filed a reply.

9. On September 9, 1998, argument was presented regarding the motion for summary decision.

10. At the conclusion of the argument, it was determined that FRS was subject to § 252(c) of the 1996 Act.

11. On September 17, 1998, e-spire™ submitted a proposed arbitration schedule stipulated to by the parties.

12. On September 22, 1998, the arbitration hearing was rescheduled to November 5, 1998.

13. On October 21, 1998, the parties submitted a joint pre-arbitration statement.

14. On October 26, 1998, the parties pre-filed testimony.

15. On November 5, 1998, the arbitration hearing commenced.

1 16. On December 15, 1998, the parties submitted post-hearing briefs.

2 17. The Commission has analyzed the issues as presented by the parties and has resolved
3 the issues as stated in the Discussion above.

4 18. The Commission hereby adopts the Discussion and incorporates the parties' positions
5 and the Commission's resolution of the issues herein.

6 19. Pursuant to A.A.C. R14-2-1506.A, the parties will be ordered to prepare an
7 amendment to their interconnection agreement, incorporating the issues as resolved by the
8 Commission, for review by the Commission pursuant to the 1996 Act, within twenty days from the
9 date of this Decision.

10 CONCLUSIONS OF LAW

11 1. U S WEST is a public service corporation within the meaning of Article XV of the
12 Arizona Constitution.

13 2. U S WEST is an ILEC within the meaning of 47 U.S.C. § 252.

14 3. e-spire™ is a public service corporation within the meaning of Article XV of the
15 Arizona Constitution.

16 4. e-spire™ is a telecommunications carrier within the meaning of 47 U.S.C. § 252.

17 5. The Commission has jurisdiction over e-spire™ and U S WEST and the subject matter
18 of the Petition.

19 6. The Commission's resolution of the issues pending herein is just and reasonable,
20 consistent with the Act, the applicable FCC Rules and Order, and the Interconnection Rules, and is in
21 the public interest.

22 ORDER

23 IT IS THEREFORE ORDERED that the Commission hereby adopts and incorporates as its
24 Order, the resolution of the issues contained in the above Discussion.

25 IT IS FURTHER ORDERED that e-spire™ Communications, Inc. (fka American
26 Communications Services, Inc.); American Communication Services of Pima County, Inc.
27 ("ACSPC"); and ACSI Local Switched Services, Inc. dba e-spire™ and U S WEST Communications,
28

1 Inc. shall prepare an amendment to their interconnection agreement incorporating the terms of the
2 Commission's resolutions.

3 IT IS FURTHER ORDERED that the signed amendment to the interconnection agreement
4 shall be submitted to the Commission for its review within twenty days of the date of this Decision.

5 IT IS FURTHER ORDERED that nothing in this Decision shall be construed to affect the
6 interstate tariffs of U S WEST Communications, Inc.

7 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

8 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

9
10   
11 COMMISSIONER-CHAIRMAN COMMISSIONER COMMISSIONER
12

13
14 IN WITNESS WHEREOF, I, STUART R. BRACKNEY,
15 Acting Executive Secretary of the Arizona Corporation
16 Commission, have hereunto set my hand and caused the official
17 seal of the Commission to be affixed at the Capitol, in the City
18 of Phoenix, this 19 day of Feb, 1999.

19 
20 STUART R. BRACKNEY
21 ACTING EXECUTIVE SECRETARY
22

23
24
25 DISSENT _____
26 BMB:dap
27
28

- 1 SERVICE LIST FOR: e-spire™ COMMUNICATIONS INC., AMERICAN
- 2 COMMUNICATIONS SERVICES OF PIMA COUNTY, INC,
- 3 ACSI LOCAL SWITCHED SERVICES, INC. and U S WEST
- 4 COMMUNICATIONS, INC.
- 5 DOCKET NOS.: T-01051B-98-0406, T-03596A-98-0406, T-03597A-98-0406
- 6 and T-03598A-98-0406
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